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## First Mervis Lecture, "Copyright and the Dead Sea Scrolls," Breathes Life into Intellectual Property Law

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By C. Genevieve Jenkins '09

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Appearing before a packed room of over 200 listeners on November 6, David Nimmer, one of the nation's leading intellectual property law scholars, delivered the inaugural Stanley H. Mervis Lecture in Intellectual Property, titled "Copyright and the Dead Sea Scrolls." The event drew attention both for its focus on the Dead Sea Scrolls and the religious controversy that surrounds them and for the intellectual property laws that Nimmer questioned throughout the course of his talk.

Nimmer's talk focused on the Israeli Supreme Court's controversial opinion in *Qimron v. Shanks* (2000), which considered the application of copyright law to a translation of the Dead Sea Scrolls. Elisha Qimron, one of the primary translators of the scrolls, brought a copyright infringement suit against Hershel Shanks and the other editors of the *Biblical Archaeology Review* for publishing the translated text of the scrolls — without Qimron's permission — in a book called *Facsimile Edition of the Dead Sea Scrolls*. Despite Qimron's twelve years of work on the translation, Shanks gave no recognition to either Qimron or John Strugnell, the other principal translator.

"[Qimron] felt crushed, humiliated and preempted, [so] he filed a lawsuit. He sued Shanks for violation of Title 17 of the United States Code — copyright infringement," said Nimmer. "But he chose an interesting district — he chose the district of Jerusalem." Qimron was able to sue Shanks under U.S. law because the book was published in the United States. He brought suit in Israel because it was more convenient for him and because the court had personal jurisdiction over Shanks, who had many times visited the country in his capacity as editor of *Biblical Archaeology Today*.

In response to Qimron's claims, Shanks asked the inevitable question: How can someone have copyright in something — a cultural text — of which he was not the original author? Although the Court, which ultimately applied Israeli law, agreed that Qimron did not have a copyright in the "raw material" — that is, he could not prevent other people from looking at, copying or translating the scrolls — it concluded that he could claim a copyright in his specific translation because his interpretation and piecing together of the existing textual strands were sufficient to constitute original



authorship.

In his lecture, Nimmer took issue with the Israeli Supreme Court's ruling that Qimron's reconstruction of historical fact was subject to copyright. The court, Nimmer asserted, based its decision on only two minor things: Qimron's repositioning of a piece of text — changing it from a vertical to a horizontal arrangement — and his insight that a letter was translated incorrectly, thereby changing the entire meaning of this scroll. Once these changes were made, Nimmer noted, the scroll was nothing more than a translation of historical fact, and historical fact is not copyrightable. "Qimron spent 12 years putting [the text] together. His 120-line reconstruction is the gold standard — nobody could have done a better job," Nimmer stated. "The question is, does he get copyright protection for it?" In Nimmer's view, the answer is no. Qimron was not, according to Nimmer, the author of an original work — he was merely the reader most able to convey someone else's original work. By presenting his work as historical fact, Nimmer noted, Qimron "was not an author, in the sense of copyright protection — he was an authority, which is the antithesis of being an author in this context."

Ending his lecture, Nimmer jokingly observed, "If [Qimron] got it exactly right, then he's presenting, in his 120-line reconstruction, exactly what was written 2,000 years ago—and he certainly has no copyright conceivably in it. By asserting copyright protection... what he's effectively saying is, 'I might be wrong, therefore I deserve copyright for my mistakes and copyright should protect my bad scholarship.' That is a result that cannot stand."

As revision editor of the renowned *Nimmer on Copyright* since 1985, David Nimmer has greatly influenced the field of copyright law. The publication, first published in 1963 by his late father, is recognized as the standard treatise in the field and has been widely cited by courts at all levels in both the U.S. and abroad.

Nimmer earned an A.B. from Stanford University and a J.D. from Yale University, where he was editor of the Yale Law Journal. He is of counsel at Irell & Manella LLP in Los Angeles, where he represents clients in the entertainment, publishing, and high-technology fields. He has testified before Congress and Parliament, served as chairman of the ABA's Committee on Intellectual Properties Litigation, and published a number of influential articles on U.S. and international copyright law.

The event was the first Stanley H. Mervis Lectureship in Intellectual Property. Mr. Mervis' family attended the lecture, and Dean Taylor Reveley recognized their



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generosity. Mervis, a member of the William & Mary Law School Class of 1950, was patent counsel for Polaroid Corporation for most of his career and was actively involved in important patent and intellectual property issues.